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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1971.

No. 71-971

FISONS LIMITED AND FISONS PHARMACEUTICALS LTD.,

*Petitioners,*

*vs.*

UNITED STATES OF AMERICA,

*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND APPENDIX.

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FISONS LIMITED AND FISONS PHARMACEUTICALS LTD.,

*Petitioners,*

*vs.*

UNITED STATES OF AMERICA,

*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND APPENDIX.

Petitioners pray that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Seventh Circuit, entered January 5, 1972.

## OPINIONS BELOW.

The opinion of the Seventh Circuit with respect to which review is sought is not yet reported. It is printed in the Appendix hereto. (A3).

The district court did not give an opinion. Its order from which the appeal was taken is printed at A1.

## JURISDICTION.

Jurisdiction is based on 28 U. S. C. §1254(1). The decision sought to be reviewed was entered January 5, 1972.

## QUESTIONS PRESENTED.

1. May a federal Court of Appeals construe a state statute contrary to the majority opinion of the most recent decision of that state's Supreme Court and instead rely upon the dissenting opinion's construction of the state statute?

2. Is it within the discretion of a federal Court of Appeals, in construing a state statute, to base that construction on what it considers to be a practical expediency of federal law enforcement?

## STATUTES INVOLVED.

Section 17(1)(a), (3), Illinois Civil Practice Act, [*Ill. Rev. Stat.*, Ch. 110 § 17 (1969)—The Illinois long-arm statute:

> **17. Act submitting to jurisdiction—Process.** (1) Any person, whether or not a citizen or resident of this State, who in person or through an agent does any of the acts hereinafter enumerated, thereby submits such person, and, if an individual, his personal representative, to the jurisdiction of the courts of this State as to any cause of action arising from the doing of any of such acts:
>
> (a) The transaction of any business within this State;
>
> (3) Only causes of action arising from acts enumerated herein may be asserted against a defendant in an action in which jurisdiction over him is based upon this Section.

## STATEMENT OF THE CASE.

Petitioner, Fisons Limited (Fisons), is and at all material times has been a British corporation. Fisons Pharmaceuticals Ltd. (Pharmaceuticals) is and at all material times has been a British corporation and a wholly-owned subsidiary of Fisons. Neither petitioner had or has an office, property, or any of the usual indicia of doing business in Illinois.

Pharmaceuticals owns United States Reissue Patent No. 24,642 covering iron dextran, a unique material used as a parenteral injectable in the treatment of iron deficiency anemia in humans and in animals, particularly pigs. This patent has been litigated and held valid in *Benger Laboratories v. R. K. Laros Co.*, 317 F. 2d 455 (3rd Cir. 1963), *cert. den.*, 375 U. S. 833 (1963).

An exclusive license under the patent was issued to Colgate-Palmolive Co. in the human field. An exclusive license was issued to Armour and Company in the animal field but later, by consent, a non-exclusive license in the same field was issued to American Home Products Corp.

Pharmaceuticals sold iron dextran to all three companies. In every case the product was sold and delivered in and title passed in England. (A16). Armour's principal office was in Illinois. A reasonably proportionate share of the iron dextran was resold by Armour and Colgate in Illinois. The sales of American Home Products were minimal.

There were occasional visits to Illinois concerning the negotiation for the licenses, all of which were executed outside Illinois. There was a larger number of visits to Illinois in connection with the aforesaid patent infringment suit which was tried in Pennsylvania. Those visits concerned the preparation for the original trial, the appeal, and

the accounting. The Court of Appeals agreed with petitioners that the visits to Illinois were not significant factors in this case." (A16).

On July 23, 1969, the Government filed a complaint against petitioners and their three American licensees pursuant to Section 4 of the Sherman Act, 15 U. S. C. § 4. (A39). Service on petitioners was purportedly pursuant to the "transaction of business" section of the Illinois state long-arm statute, Section 17(1)(a) of the Illinois Civil Practice Act. No charge of tort violation in Illinois was made or is in issue.

On August 21, 1969, petitioners moved to quash service and to dismiss the complaint against them for lack of jurisdiction. On August 27, 1971, the district court overruled the motion, but certified the question, pursuant to the provisions of 28 U. S. C. § 1292(b), as follows (A1-2):

> The Court is of the opinion that this matter involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the Order may materially advance the ultimate termination of this litigation.
>
> The controlling question of law presented is whether as of July 23, 1969, either British defendant Fisons Limited or Fisons Pharmaceuticals Ltd. was transacting business in Illinois sufficient to permit service under the long-arm statute § 17(1)(a) of the Illinois Civil Practice Act, where the only contact of these defendants with Illinois is as follows: (a) defendants are parties to a patent license agreement with a licensee found in Illinois, the agreement having been executed outside of Illinois; (b) defendants make and sell patented products to such patent licensee in England where title passes; and (c) defendants' officers

have visited Illinois to discuss with such licensee said agreement and possible future agreements, and to discuss with counsel in Illinois matters concerning a patent infringement suit filed in the Third Circuit.

On January 5, 1972, the Court of Appeals for the Seventh Circuit affirmed the district court's decision. (A3). This petition followed in due course.

## REASONS FOR GRANTING THE WRIT.

The Seventh Circuit, instead of following the majority opinion of the latest decision of the Illinois Supreme Court, *Grobark* v. *Addo Machine Co.*, 16 Ill. 2d 426, 158 N. E. 2d 73 (1959),* adopted the *dissent* in that case, (A17).

This is simply an improper collateral attack on the majority opinion. It is axiomatic that a federal court is bound to follow the decisions of the state court of last resort in construing a state statute, absent a federal constitutional attack on that statute. See, for example, *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, 78-80 (1938); *Kelley* v. *Delaware L. & W. R. Co.*, 170 F. 2d 195, 196 (1st Cir. 1948); *Mangol* v. *Metropolitan Life Ins. Co.*, 103 F. 2d 14, 17-18 (7th Cir. 1939); *Klages* v. *Cohen*, 146 F. 2d 641, 644 (2nd Cir. 1945); *Arrowsmith* v. *United Press International*, 320 F. 2d 219, 229-31 (2nd Cir. 1963); *Aetna Insurance Company* v. *Barnett Brothers, Inc.*, 289 F. 2d 30, 36 (8th Cir. 1961); *Dayton & Michigan R. Co.* v. *Commissioner of Internal Revenue*, 112 F. 2d 627, 630 (4th Cir. 1940). The question is not whether the Supreme Court of Illinois should have found as it did, but what it did find. If the Illinois Legislature felt that the Illinois Supreme Court had too narrowly interpreted the long-arm statute in *Grobark*, it has had twelve years to change that law. It has not done so.

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* Printed at A22.

The fact that the Seventh Circuit found it necessary to refer to inferior Illinois Appellate Court decisions to bolster its decision shows it was not completely satisfied with its approach in adopting the dissent in *Grobark*. The fact, of course, is that *Grobark* cannot be overturned by lower court decisions and neither can the federal courts treat them as the law in Illinois in the face of the majority opinion in *Grobark*.

The Court of Appeals for the Seventh Circuit also felt it necessary to refer to a decision of the Illinois Supreme Court in a tort case. We have conceded that the tort jurisdiction under the Section 17(1)(b) of the Illinois long-arm statute has been construed more broadly than the "transaction of business" section. Section 17(1)(b)—the tort section—is not involved in this case, nor was it in *Grobark*.

Lastly, the Seventh Circuit felt it necessary to bolster its decision by pointing out that unless a way was found to obtain jurisdiction of these petitioners in connection with their patent activities, federal antitrust enforcement might be impeded.* It overlooked the fact that it was dealing with an Illinois, not a federal, statute. The factual distinction between this case and *Grobark* asserted by the Seventh Circuit relates solely to federal patent and antitrust matters; factors which were certainly not the concern of the Illinois Legislature when it passed the Illinois long-arm statute. Federal policy should be handled by Congress, not by engrafting it to state statutes having no related purpose or intent.

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* Of course, the Court pointed out that it was not passing on the validity of the charges made against the petitioners.

## CONCLUSION.

For the foregoing reasons, petitioners respectfully urge that this petition be granted.

Respectfully submitted,

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# APPENDIX.

[DISTRICT COURT'S ORDER DENYING PETITIONER'S MOTION TO DISMISS AND CERTIFYING QUESTION TO COURT OF APPEALS PURSUANT TO 28 U. S. C. § 1292(b) (N. D. ILL. C. A. 69 C 1530—U. S. v. FISONS, ET AL.)].

This Order supersedes the previous Court Order dated August 6, 1971, which was withdrawn on August 13, 1971.

This matter is before the Court upon the filing of motion by defendants Fisons Limited and Fisons Pharmaceuticals Ltd. to quash service of process and to dismiss the complaint.

Upon due and proper consideration of said motion and all of the memoranda filed in support thereof and in opposition thereto by the respective parties in interest, the Court is of the opinion that said motion is not well taken and should be denied.

Therefore, it is ordered that said motion of said defendants to quash service of process and to dismiss the complaint be and the same is hereby denied.

The Court is of the opinion that this matter involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the Order may materially advance the ultimate termination of this litigation.

The controlling question of law presented is whether as of July 23, 1969, either British defendant Fisons Limited or Fisons Pharmaceuticals Ltd. was transacting business in Illinois sufficient to permit service under the long-arm statute § 17(1)(a) of the Illinois Civil Practice Act, where the only contact of these defendants with Illinois is as follows:

(a) defendants are parties to a patent license agreement with a licensee found in Illinois, the agreement having been executed outside of Illinois; (b) defendants make and sell patented products to such patent licensee in England where title passes; and (c) defendants' officers have visited Illinois to discuss with such licensee said agreement and possible future agreements, and to discuss with counsel in Illinois matters concerning a patent infringement suit filed in the Third Circuit.

It is also ordered that further proceedings in this Court be stayed as to defendants Fisons Limited and Fisons Pharmaceuticals Ltd. until a final decision on any interlocutory appeal under 28 USC § 1292(b).

/s/ J. S. PERRY
[*District Judge*]

Chicago, Illinois

Dated: August 27, 1971

IN THE UNITED STATES COURT OF APPEALS

For the Seventh Circuit.

September Term, 1971 — September Session, 1971.

Misc. No. 1235

FISONS LIMITED AND FISONS PHARMACEUTICALS LTD.,
*Petitioners-Defendants,*

v.

UNITED STATES OF AMERICA,
*Respondent-Plaintiff.*

Petition For Appeal Under § 1292(b)

From the United States District Court for the Northern District of Illinois.

No. 69 C 1530

HON. J. SAM PERRY, *Judge.*

[COURT OF APPEAL'S DECISION AFFIRMING DISTRICT COURT—JANUARY 5, 1972]

Before PELL, STEVENS and SPRECHER, *Circuit Judges.*

STEVENS, *Circuit Judge.* Three jurisdictional issues are presented by this appeal: (1) whether an interlocutory order in a civil antitrust case brought by the United States may be reviewed by a court of appeals pursuant to 28 U. S. C. § 1292(b); (2) if so, whether this is an appropriate case for the exercise of that jurisdiction; and (3) if that also be so, whether the district court acquired personal jurisdiction over petitioners as a result of service effected pursuant to § 17(1)(a) of the Illinois Civil Practice Act. We answer all three questions in the affirmative.

Petitioners are two British corporations, one the wholly owned subsidiary of the other, each having its principal place of business in England. They manufacture iron dextran in Great Britain and sell it to certain large American companies. Iron dextran is a patented product used in the treatment of anemia and other iron deficiency conditions in humans and other animals. Petitioners own the American patent on iron dextran and have entered into license agreements which the Government claims are violative of the Sherman Act.

This litigation was commenced on July 23, 1969, when the Government filed its complaint pursuant to § 4 of the Sherman Act, 15 U. S. C. § 4, against five defendants, including the two petitioners and their three American licensees. It is alleged that trade in iron dextran has been unreasonably restrained since 1956 by the defendants' license agreements which allocate markets, restrict the resale of the product in bulk form, control the use of certain trademarks, require the licensees to assign all trademarks to petitioners when the agreements expire, and restrict the grant of additional licenses.

The jurisdictional requirement of § 17(1)(a) of the Illinois Civil Practice Act was allegedly satisfied by (1) the existence of the agreements, which affect the economy of Illinois; (2) the fact that all three licensees do business in Illinois; (3) the continual exportation of iron dextran from Britain for resale in Illinois; and (4) the fact that certain business relating to the agreements was transacted in Illinois by officers of petitioners and a predecessor in interest.

On August 21, 1969, petitioners filed a motion to quash service and to dismiss the complaint against them for lack of jurisdiction. The motion was supported by an affidavit in which the conclusory allegations in the complaint were denied, and except for three visits in 1968 and two in 1969, all direct contact between petitioners and the transaction

of business in Illinois was specifically denied. The Government conducted extensive discovery on the jurisdictional issue, the matter was briefed extensively, and ultimately the district court overruled the motion to quash or to dismiss.

In his order entered on August 27, 1971, the district judge expressed the opinion that he had decided "a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the Order may materially advance the ultimate termination of this litigation." He then stated the controlling question[1] and ordered that further proceedings involving the two petitioners be stayed "until a final decision on any interlocutory appeal under 28 U. S. C. § 1292(b)."

Within the 10-day period specified in the statute petitioners sought permission from this court to take an appeal from that order.[2] The Government opposed the

1. "The controlling question of law presented is whether as of July 23, 1969, either British defendant Fisons Limited or Fisons Pharmaceuticals Ltd. was transacting business in Illinois sufficient to permit service under the long-arm statute § 17(1)(a) of the Illinois Civil Practice Act, where the only contact of these defendants with Illinois is as follows: (a) defendants are parties to a patent license agreement with a licensee found in Illinois, the agreement having been executed outside of Illinois; (b) defendants make and sell patented products to such patent licensee in England where title passes; and (c) defendants' officers have visited Illinois to discuss with such licensee said agreement and possible future agreements, and to discuss with counsel in Illinois matters concerning a patent infringement suit filed in the Third Circuit."

2. By separate petition they also prayed for a writ of mandamus or prohibition. Because such relief in this court is only appropriate "in aid of" our own jurisdiction, see *United States Alkali Association* v. *United States*, 325 U. S. 196, 202; *Roche* v. *Evaporated Milk Assn.*, 319 U. S. 21, 25, we held that it could not be granted unless we had jurisdiction pursuant to § 1292(b), in which event the extraordinary relief would be unnecessary. We therefore denied the petition for a writ of mandamus or prohibition.

petition, contending that § 1292(b) is not applicable to cases which are subject to the Expediting Act of 1903, 15 U. S. C. § 29, and in any event, since the decision of the district court was correct, there was no reason to allow a discretionary appeal.

On September 30, 1971, after noting the importance and novelty in this court of the question presented under § 1292(b), we set the matter for oral argument, invited the parties to file additional memoranda, and directed that the district court proceedings not be stayed while the issues were under consideration here.

We now explain why we believe each jurisdictional question should be answered affirmatively.

## I.

The two statutes directly relevant to the first jurisdictional issue were enacted, respectively in 1903 and 1958. The earlier is commonly known as the Expediting Act,[3] and the latter as the Interlocutory Appeals Act.

The Expediting Act applied to suits in equity brought under the Sherman Act, the Interstate Commerce Act, or any other act "having a like purpose" that might thereafter be enacted. Its first section authorized the Attorney General to file a certificate of importance in such cases, whereupon the matter would be heard by three judges and given precedence over other litigation "and in every way expedited." That procedure, though still authorized

3. Its actual title was: "An Act To expedite the hearing and determination of suits in equity pending or hereafter brought under the Act of July second, eighteen hundred and ninety, entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies,' 'An Act to regulate commerce,' approved February fourth, eighteen hundred and eighty-seven, or any other Acts having a like purpose that may be hereafter enacted." 32 Stat. 823.

by 15 U. S. C. § 28, was not used in this case and has been employed rarely, if at all, in recent years.[4]

Section 2 of the Expediting Act drastically shortened the time for appeal in cases covered by the statute. Prior to its enactment in 1903, six months were allowed in which to take an appeal to the Circuit Court of Appeals, 26 Stat. 826, 829, and one year after the entry of that court's judgment, an appeal lay to the Supreme Court. 26 Stat. at 828. Section 2 provided:

> "That in every suit in equity pending or hereafter brought in any circuit court of the United States under any of said Acts, wherein the United States is complainant, including cases submitted but not yet decided, an appeal from the final decree of the circuit court will lie only to the Supreme Court and must be taken within sixty days from the entry thereof. . . ."[5] 32 Stat. 823; 15 U. S. C. § 29.

By its terms, § 2 of the Expediting Act applies to appeals from final decrees in a limited category of cases. The Interlocutory Appeals Act of 1958 makes no reference to final orders and its language is applicable to all civil litigation in the federal district courts. It provides:

> "*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That section 1292 of title 28 of the United States Code is hereby amended by insertion of the letter (a) at the beginning of the section and adding at the end thereof an additional subparagraph lettered (b) to read as follows:
>
> "'(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order in-

4. See Proposed Amendment to Expediting Act Would Eliminate Direct Appeal to Supreme Court, 39 N. Y. U. L. Rev. 319, 325 n.40 (1964).

5. The section also included a proviso relating to appeals taken before the effective date of the statute.

> volves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however*, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.'
>
> "Approved September 2, 1958." 72 Stat. 1770.

A plain reading of the two statutes reveals no inconsistency between them. If they had been enacted simultaneously, the language of each could be given full effect without limiting the scope of the other. If some conflict in literal meaning did exist, under normal rules of construction the later statute would prevail. *United States v. Wrightwood Dairy Co.*, 127 F. 2d 907, 912 (7th Cir. 1942); *Eisenberg v. Corwin*, 179 F. 2d 275, 276 (D. C. Cir. 1949).

The purpose of the 1958 Act is consistent with the expediting purpose of the 1903 Act.[5] Although it authorizes a departure from the general practice of postponing appellate review until after the entry of a final judgment, such authorization is only for the purpose of materially advancing the ultimate termination of the litigation. The specified procedure must be invoked within ten days and shall not stay proceedings in the trial court unless a judge shall expressly so direct.

The legislative history of the Interlocutory Appeals Act indicates that it was intended to apply to protracted cases, including antitrust litigation.[6] Indeed, it is fair to

6. We recognize that the examples of antitrust litigation referred to in the Senate Committee Report were apparently private cases and that no unambiguous reference to Government liti-

infer that its primary efficacy was expected to occur in cases of exceptional magnitude.[7] In sum, the plain language, the purpose, and the history of the Interlocutory Appeals Act of 1958 are all consistent with its application to civil antitrust litigation commenced by the United States.

The Government advances a number of arguments for a contrary interpretation. None of these arguments questions the wisdom of applying the 1958 Act to this type of case, or suggests any conflict between the language or the policy of the two statutes. In essence, it is the Government's position that the Expediting Act is an especially important statute which has been construed to mean a great deal more than it says, and specifically to foreclose interlocutory appeals; nothing short of an

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gation appears. The many federal judges who participated in the consideration of the proposed legislation, however, were certainly familiar with appellate procedure in both private and Government antitrust litigation, whether civil or criminal.

7. Thus, a letter from the Administrative Office of the U. S. Courts appended to the Senate Committee Report stated that the interlocutory appeal procedure "will be used only in exceptional cases where a decision of the appeal may avoid protracted and expensive litigation, as in antitrust and similar protracted cases. . . ." S. Rep. 2434 (85th Cong. 2d Sess.) 1958 U. S. Code Cong. & Adm. News 5255, 5259.

The report itself contained language, which, with only slight changes, might have been written of the very case before us:

> "For example, in a recent case a motion to dismiss for want of jurisdiction was filed in the district court early in the proceedings. The district court denied the motion and the matter then proceeded to trial. The disposition of that case took almost 8 months. Upon final order the case was appealed and the court of appeals determined that the district court did not have jurisdiction and entered an order accordingly. Had this legislation been in effect at that time, the district judge could have stated in writing his opinion that the motion was controlling and the defendant could thereupon have made application to the court of appeals for a review of the order denying the motion." 1958 U. S. Code Cong. & Adm. News at 2556.

express amendment of that statute, it is argued, should be permitted to modify that construction. Since other circuits have accepted these arguments, we have considered them with care.

First, we note that the Expediting Act is just another statute. It has been on the books a long time and it deals with important litigation. But the statute itself commands no special respect today. It has been criticized by Supreme Court Justices[8] and other scholars,[10] and narrowly construed to permit a court of appeals to participate in appellate review of at least one civil antitrust case in which the Government was a party.[11] We do not consider our appraisal of the question presented here as an intrusion on hallowed ground.

Second, we note the significant difference between this question and the issues raised by attempts to appeal from orders granting or denying preliminary injunctions pur-

8. *Farbenfabriken Bayer A. G.* v. *United States*, 1968 Trade Cases ¶ 72,570 (D. C. Cir.), *cert. denied* 393 U. S. 959; *Tidewater Oil Co.* v. *United States*, Misc. No. 9751 (9th Cir. July 28, 1971), *cert. denied* 40 U. S. L. W. 3212.

9. "Whatever may have been the wisdom of the Expediting Act in providing direct appeals in antitrust cases at the time of its enactment in 1903, time has proven it unsatisfactory. See, *e.g.*, Gesell, A Much Needed Reform—Repeal the Expediting Act for Antitrust Cases, in 1961 N. Y. State Bar Assn. Antitrust L. Sym. 98 (CCH). Direct appeals not only place a burden on the Court but also deprive us of the valuable assistance of the Courts of Appeals." *United States* v. *Singer Mfg. Co.*, 374 U. S. 174, 175 n. 1.

See also *Brown Shoe Co.* v. *United States*, 370 U. S. 294, 355 (Mr. Justice Clark concurring); 370 U. S. at 364-365 (Mr. Justice Harlan dissenting in part).

10. See Comment, Direct Appeals in Antitrust Cases, 81 Harv. L. Rev. 1558 (1968); Comment, Proposed Amendment to Expediting Act Would Eliminate Direct Appeal to the Supreme Court, 39 N. Y. U. L. Rev. 319 (1964).

11. *Shenandoah Valley Broadcasting, Inc.* v. *ASCAP*, 375 U. S. 39.

suant to § 1292(a) of the Judicial Code. That section has a dramatically different history, as well as a significant difference in its language, from § 1292(b). That long history was thoughtfully and thoroughly reviewed by the First Circuit in *United States* v. *Cities Service Co.*, 410 F. 2d 662 (1969), and by the Third Circuit in *United States* v. *Ingersoll Rand Co.*, 320 F. 2d 509 (1963); see also the opinion of Mr. Justice Goldberg in chambers in *United States* v. *F. M. C. Corp.*, 84 Sup. Ct. 4 (1963).

It is sufficient to note that the enactment of the Expediting Act in 1903 was a chapter in that history which had commenced earlier, and that the enactment of § 1292(a) in 1948 was merely intended to codify preexisting law. As Judge Coffin described it, § 1292(a) was a "palimpsest," 410 F. 2d at 665. On the other hand, § 1292(b) was a brand new statute written in 1958 on a totally clean slate. Moreover, the text of § 1292(a) contains an exception "where a direct review may be had in the Supreme Court" which arguably was intended to encompass all litigation covered by the Expediting Act. There is no comparable exception in § 1292(b). We do not consider the cases construing § 1292(a) applicable to § 1292(b).[12]

The case which provides the Government with its strongest support is *United States* v. *California Canneries*, 279 U. S. 553. In that case the court of appeals for the District of Columbia had entertained an appeal from an order denying leave to intervene; the Supreme Court reversed, holding "that by reason of the Expediting Act the Court of Appeals was without jurisdiction of an appeal in a suit in equity under the Anti-Trust Act in which the United States is the complainant. . . ." 279 U. S. at 559. Earlier in the opinion, Mr. Justice Brandeis noted that the Expediting

12. We also consider inapposite the dicta in *Brown Shoe Co.* v. *United States*, 370 U. S. 294, 304-305, which was merely directed at the issue of finality.

Act limited the right of review to an appeal from a final decision and "precluded the possibility of an appeal to either court from an interlocutory decree." 279 U. S. at 558. These comments are especially forceful because the Court found it unnecessary to consider the language of the statute which arguably sustained the jurisdiction of the court of appeals, but instead relied entirely on the effect of the Expediting Act.

Nevertheless, *California Canneries* must be considered in its context. In 1929, when that case was decided, the section of the District of Columbia Code which had been involved to sustain jurisdiction of an interlocutory appeal had no counterpart in the general statutes conferring jurisdiction on federal appellate courts in other circuits. It would have been most anomalous for Government antitrust litigation to follow one procedural route in the District of Columbia and a different route in the remainder of the country.

Moreover, as the history of § 1292(a) discloses, the enactment of the Expediting Act did eliminate the preexisting right to appellate review of certain interlocutory decrees. The statement to that effect in the Court's opinion cannot, therefore, be taken as an interpretation of the subsequently enacted statute, particularly since the 1958 statute is consistent with an expediting purpose, whereas the procedure condemned in *California Canneries* had a dilatory effect.

Finally, we reject the Government's argument that it would be anomalous for a court of appeals to pass on controlling questions of law in cases which are directly reviewable in the Supreme Court after the entry of final judgment. Whenever we consider a controlling question in any litigation, our views are subject to final revision by the Supreme Court. The practical objection to our exercise of § 1292(b) jurisdiction in cases covered by the Expediting

Act is predicated not on the suggested anomaly, but rather on the risk that our participation in the appellate process might add to the burdens of the Supreme Court. This risk does exist because certain interlocutory orders would become final if reversed on appeal.[13] However, most interlocutory orders would remain interlocutory even if reversed,[14] and none would become final if affirmed. Moreover, the number of cases covered by the Expediting Act is small and the fact that we have power to hear appeals from interlocutory orders does not mean that we must exercise it without restraint. In balance, we are persuaded that the efficacious purpose of § 1292(b) to expedite the ultimate termination of protracted cases justifies its application in Government antitrust litigation as well as in other similarly complex matters.

We hold that we have jurisdiction of this appeal pursuant to 28 U. S. C. § 1292(b).

## II.

Our conclusion that § 1292(b) is applicable to cases covered by the Expediting Act does not mean that our jurisdiction may be exercised routinely. In every application under § 1292(b) the appellant has the burden of persuading the court of appeals that exceptional circumstances justify a departure from the basic policy of postponing appellate review until after the entry of a final judgment.[15] Of para-

13. The order challenged here is an example. See *United States* v. *Scophony Corp.*, 333 U. S. 795.

14. Hopefully, most reversals would merely require a district court to enter the form of order that should have been entered in the first instance. In such cases the desirability of postponing Supreme Court review of the issue until the entire litigation is completed is certainly outweighed by the desirability of protecting the litigant from the consequences of error. *Cf. United States Alkali Exporters Assn.* v. *United States*, 325 U. S. 196, 201-204.

15. See *Fargay* v. *Conrad*, 47 U. S. 201, 205; *Cobbledick* v. *United States*, 309 U. S. 323, 324-325:

"The granting of the appeal is also discretionary with the

mount importance is the requirement that immediate review will "materially advance the ultimate termination of the litigation." This requirement is of special importance in Expediting Act cases. The policy of that statute dictates prompt action at every stage of a case raising issues of public importance. Moreover, since a court of appeals is not a normal participant in the reviewing process, special care must be taken to avoid the risk that a § 1292 appeal may actually impede, rather than expedite, the conclusion of the entire case.[16]

We are persuaded that it is appropriate to exercise our jurisdiction in this case for four reasons. First, having heard argument on the threshold issue, we have necessarily made some study of the record and the question arising under the Illinois statute, and are prepared to decide it forthwith. Second, if the district court's order is erroneous, the interests of justice, as well as the desirability of concluding the litigation against petitioners promptly, strongly favor immediate review. Indeed, the posture of the issue is such that an application for an extraordinary writ might receive serious consideration from the Supreme

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court of appeals which may refuse to entertain such an appeal in much the same manner that the Supreme Court today refuses to entertain applications for writs of certiorari. "It should be made clear that if application for an appeal from an interlocutory order is filed with the court of appeals, the court of appeals may deny such application without specifying the grounds upon which such a denial is based. It could be based upon a view that the question involved was not a controlling issue. It could be denied on the basis that the docket of the circuit court of appeals was such that the appeal could not be entertained for too long a period of time. But, whatever the reason, the ultimate determination concerning the right of appeal is within the discretion of the appropriate circuit court of appeals." S. Rep. No. 2434, 85th Cong. 2d Sess. 3, 4, 1958 U. S. Code Cong. & Adm. News 5255.

16. For this reason a stay of proceedings in the district court pending an appeal to this court will seldom, if ever, be appropriate.

Court. *Cf. United States Alkali Exporters Assn.* v. *United States*, 325 U. S. 196, 201-204; *DeBeers Consolidated Mines Ltd.* v. *United States*, 325 U. S. 212, 217. Third, the question which is presented arises under an Illinois statute. On questions of state law, the Supreme Court has repeatedly indicated the desirability of having the benefit of consideration by court of appeals judges who are frequently required to dispose of state law issues in their respective jurisdictions.[17] And, finally, the record developed in the district court to support the motion to quash sufficiently parallels the record in *Grobark* v. *Addo Machine Co.*, 16 Ill. 2d 426, 158 N. E. 2d 73 (1959), to indicate a strong likelihood that petitioner's position is sound.

We have, therefore, decided to grant the petition for leave to appeal pursuant to § 1292(b). We now consider the merits of the appeal.

III.

Appellants raise no question about the form of the process, the manner in which it was served, the adequacy of notice, or venue. There are some differences between the two appellants,[18] but since they broadly contend that neither is subject to federal jurisdiction in Illinois, they place no emphasis on such differences.

The two companies are parts of one economic enterprise. They have no office or property in Illinois. Their manu-

17. *Huddleston* v. *Dwyer*, 322 U. S. 232, 237.

18. Benger Labs, a wholly owned subsidiary of Fisons Limited, had negotiated the agreements involved. In 1964 Fisons Pharmaceuticals was formed as a wholly owned subsidiary of Fisons Limited. Benger Labs, though remaining in existence as a subsidiary of Pharmaceuticals, transferred the iron dextran patent and the rights and obligations under the license agreements to Pharmaceuticals. Representatives of Pharmaceuticals visited Illinois on matters of patent litigation in the third circuit and a few other incidental matters. Representatives of Fisons Limited visited Illinois to discuss an incentive proposal relating to a quantity discount and to discuss a marketing survey.

facturing is performed in Great Britain and title to the iron dextran sold to their American customers passes before the product leaves the shores of England. The American distributors are substantial concerns in their own right; each handles many other products and presumably has the financial strength to respond to any claims from their respective customers."

The visits to Illinois by officers of appellants, or their predecessors, have been minimal, primarily relating to the conduct of certain patent litigation in Philadelphia. The facts concerning these visits were developed at length in discovery, but we agree with appellants that it would be somewhat artificial to use these sporadic visits to measure the significance of their contacts with Illinois. We also agree with appellants that similarities between this record and the facts of *Grobark* v. *Addo Machine Co.*, 16 Ill. 2d 426, 158 N. E. 2d 73 (1959) necessitates a careful consideration of that case.

There, as here, plaintiffs relied on § 17(1)(a) of the Illinois Civil Practice Act. Grobark was an exclusive distributor of adding machines purchased in New York from Addo and resold in Illinois. The distributorship was terminated and Grobark brought suit in the Circuit Court of Cook County. The Illinois Supreme Court concluded that Grobark and his son were not agents of Addo.

> "They were independent businessmen in Illinois selling their own merchandise which had been manufactured by the defendant. They were not transacting business for the defendant in Illinois; they were transacting business for themselves. * * *
>
> "As recently announced by the United States Supreme Court in the Hanson case [*Hanson* v. *Denckla*, 357 U. S. 235], there are still territorial limitations to a State's *in personam* jurisdiction. Since Addo did not have 'minimum contacts' with the State of Illinois, we are of the opinion that Addo did not submit to the jurisdiction of the Illinois courts." 158 N. E. 2d at 78.

We have concluded that *Grobark* is not controlling here for two reasons, one factual and one legal. The significance of the factual distinction will be apparent if we first place the majority opinion in *Grobark* in proper legal context.

Justice Davis, joined by Justice Schaefer, filed a lucid dissenting opinion, pointing out that the Court's holding did not rest on a construction of the Illinois statute, but rather on the majority's interpretation of the Fourteenth Amendment to the Federal Constitution.[19] Since we are not bound by a state court's answer to a federal question, it is entirely appropriate for us to state our agreement with the dissenting Justices' analysis of federal law as applied to the *Grobark* facts.

As they pointed out, prior to *Grobark* the Illinois Supreme Court had squarely held that §§ 16 and 17 of the Illinois Civil Practice Act reflected a conscious purpose to assert jurisdiction over nonresident defendants to the extent permitted by the due process clause. *Nelson* v. *Miller*, 11 Ill. 2d 378, 143 N. E. 2d 673, 679 (1957). Their view was supported by learned comment on the statute both prior[20] and subsequent[21] to *Grobark*, by the majority in *Grobark*

19. "The opinion finds that the due process clause of the Fourteenth amendment to the United States constitution prohibits the exercise of jurisdiction by the Illinois courts in this case. I do not agree." 158 N. E. 2d at 80. We note that the analysis in Chief Justice Daily's majority opinion rested entirely on federal precedent. He did not purport to depart from the basic holding of *Nelson* v. *Miller*, 11 Ill. 2d 378, 143 N. E. 2d 673 (1957), discussed in the text at n. 20, *infra*.

20. Justice Davis made reference to the following: Cleary and Seder, Extended Jurisdictional Bases for Illinois Courts, 50 N. U. L. R. 599; Joint Committee Comments, Smith-Hurd Anno. Stat., chap. 110, par. 17, p. 164; Jenner and Tone, Historical and Practice Notes, Smith-Hurd Anno. Stat., chap. 110, par. 17, p. 165; Expanded Concepts of State Jurisdiction over Nonresidents, O'Connor & Goff, 31 Notre Dame Lawyer, 220. See 158 N. E. 2d at 81.

21. See Royce and Mason, Nonresident Jurisdiction in Business Litigation, Part 1, Chicago Bar Record, Vol. 53, p. 100 (1971).

itself,[22] and has been reaffirmed in more recent decisions.[23] Thus, it is fair to state that the scope of the Illinois statute is measured by federal standards.

*Hanson* v. *Denckla*, 357 U. S. 235, on which the *Grobark* majority relied, does reaffirm the constitutional requirement that a nonresident must have certain qualifying contacts with the forum state to be subject to its *in personam* jurisdiction. Moreover, the holding of that case requires us to focus attention on the nonresident rather than simply the unilateral activities of a resident seeking to assert jurisdiction over a foreign defendant.

> "The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State. The application of that rule will vary with the quality and nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws. *International Shoe Co.* v. *Washington*, 326 U. S. 310, 319." 357 U. S. at 253.

Under the rule as stated in *Hanson*, we believe the record discloses a sufficient relationship between appellants and the transaction of business in Illinois to subject them to federal jurisdiction in the court below. We believe they have purposefully availed themselves of the benefits and protections of local law and commerce, and that their contracts have significantly affected the way in which business is conducted in Illinois.

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22. 158 N. E. 2d at 76.

23. *Coplin* v. *Thomas, Haab and Botts*, 73 Ill. App. 2d 242, 219 N. E. 2d 646 (1st Dist. 1966); *Ziegler* v. *Houghton-Mifflin Co.*, 80 Ill. App. 2d 210, 224 N. E. 2d 12 (2d Dist. 1967); see *O'Hare International Bank* v. *Hampton*, 437 F. 2d 1173, 1176 (7th Cir. 1971). See also *Gray* v. *American Radiator & Standard Sanitary Corp.*, 22 Ill. 2d 432, 176 N. E. 2d 761 (1961), a tort case making the same point.

Appellants are not simply foreign manufacturers whose products are resold in the forum, or foreign patentees whose licensees are free to distribute a patented product locally on such terms as may be advantageous to themselves in the local market. The contractual relationships embody elements of control which the *Grobark* majority found significantly absent in that case.[24]

Appellants have, of course, obtained the benefit and protection of our patent laws.[25] The principal place of business of one of its licensees is located in Illinois. That licensee is also, by reason of a contract separate from though related to the license agreement, an important distributor of iron dextran manufactured by appellants. Although the licensee-distributor is not a common law agent, its home offices in Illinois provide appellants with a significant practical contact with the forum state.[26] If there is a location in the United States where appellants' relationship to American commerce makes it appropriate to sustain jurisdiction over them, Illinois may, therefore, be the least objectionable forum. *Cf. United States* v. *Scophony Corp.*, 333 U. S. 795, 817.[27]

24. The majority opinion there stated that the defendant "did not at any time have the right to exercise any control over the distributors; . . . ." 158 N. E. 2d at 79.

25. The patent on iron dextran, U. S. Letters Patent No. 2,820,740, was originally issued on January 21, 1958, and subsequently reissued on April 28, 1959. "They should not be in the position, even though indirectly, to enjoy the fruit but to disavow the situs of the tree from which the fruit was derived." *O'Hare International Bank* v. *Hampton*, 437 F. 2d 1173, 1177 (7th Cir. 1971).

26. "The test of whether business was transacted within the state must be applid in the context, not of communication and transportation criteria of yesteryears, but of modern day commercial and personal accelerated relationships. The long arm statutes are comrades of the computer." *O'Hare International Bank* v. *Hampton*, 437 F. 2d 1173, 1177 (7th Cir. 1971).

27. It is possible that the real issue is whether it is fairer to make appellants come to Chicago to defend their use of an

Sales of iron dextran in Illinois generate both profits and royalties for appellants. The patent license agreement (and the supply agreement which incorporates the restrictions of the license agreement) contains provisions which control aspects of the business activities of the American licensee.[28] Thus, some, if not all, of the principal's eco-

American patent than to allow them a measure of immunity from attack under the Sherman Act. Judge Hand's comment is relevant:

> "In the end there is nothing more to be said than that all the defendant's legal activities, taken together, do not make it reasonable to impose such a burden upon it. It is fairer that the plaintiffs should go to Boston than that the defendant should come here. *Waterbury v. Mac & Gilbert, Inc.*, 45 F. 2d 139, 143 (2d Cir. 1930)."

The existence of the patent avoids the problem of "power" to enforce a judgment against a person otherwise beyond the reach of the Full Faith and Credit clause. See *Michigan Trust Co. v. Ferry*, 228 U. S. 346, 353.

28. The license agreement with Armour provides in part that: (1) the licensee is limited to manufacture, sale, and use for veterinary purposes only; (2) the licensor is to supply promotional literature for use by the licensee; (3) both parties must keep each other informed of their respective research, trade and secret processes, working details, etc.; (4) the licensee must supply samples of its manufactured product to the licensor and withdraw such product if it does not meet the licensor's standards; (5) the licensee cannot use the licensor's trademark and must, after termination of the agreement, assign whatever trademark it does use to the licensor; (6) labeling requirements are imposed on the licensee such that no indication may be given of a possible use of the product other than veterinary use; (7) Illinois law applies and the parties agree to submit certain disputes to a member of the Illinois Bar for resolution. The supply agreement incorporates the restrictions and controls of the license agreement.

We, of course, imply nothing whatever as to the propriety of these provisions as a matter of substantive, in this case antitrust, law. We merely hold that the licensor by the agreement has sufficient control over the business of an Illinois based corporation to provide the minimum contacts with the State of Illinois required under the Illinois long arm statute.

In *United States v. Scophony Corp.*, the Supreme Court stated:

> "We need not decide whether, in view of the agreements' continuing and pervasive effects, they could be considered as sufficing in themselves to make Scophony 'found' within the New York district." 333 U. S. 795, 814.

nomic control over an agent is continuously exercised by appellants over their American representatives. Their continuing relationship, including a significant measure of control over business activities within Illinois, is in our view, sufficent to sustain jurisdiction. See *McGee v. International Life Insurance Co.*, 355 U. S. 220, 223; *Lurie v. Rupe*, 51 Ill. App. 2d 164, 201 N. E. 2d 158 (1st Dist. 1964).[29]

The order entered by the district court on August 27, 1971, is affirmed.

29. "Traditional notions of fair play and substantial justice is the essence of due process in the area of jurisdiction over non-resident defendants and it is no violation of such notions to provide that this case be tried in the Courts of Illinois." *Ziegler v. Houghton-Mifflin Co.*, 80 Ill. App. 2d 210, 224 N. E. 2d 12, 16 (2d Dist. 1967).

## ILLINOIS SUPREME COURT DECISION IN GROBARK v. ADDO MACHINE CO., INC., 16 ILL. 2d 426 (1959).

MR. CHIEF JUSTICE DAILY delivered the opinion of the court:

The plaintiffs, John G. Grobark and John C. Grobark, filed their complaint in the superior court of Cook County against Addo Machine Company, Inc., herein referred to as Addo, and John P. Berg and Robert Hanson (who are not parties to this appeal). The plaintiffs asked judgment for $50,000 against the three defendants and $25,000 as punitive damages against the individual defendants.

Personal service was obtained on Addo in New York City by the sheriff of New York County. The plaintiffs assert jurisdiction over Addo under sections 16 and 17 of the Civil Practice Act (Ill. Rev. Stat. 1957, chap. 110, pars. 16, 17) as a case arising out of the transaction of business within the State of Illinois.

Addo filed a special appearance for the sole and limited purpose of objecting to the jurisdiction of the court upon the ground that it had not transacted business within the State of Illinois, and that the matters complained of took place prior to January 1, 1956, the effective date of the amendatory act. The court, upon the complaint, special appearance and certain affidavits, entered an order quashing the service of summons upon Addo. Upon appeal, the Appellate Court affirmed the order of the superior court upon the ground that Addo was not transacting business in the State of Illinois, and, therefore, did not submit to the jurisdiction of the courts of Illinois. We granted leave to appeal. Subsequent to the order of the trial court, this court decided, in *Nelson* v. *Miller*, 11 Ill. 2d 378, 382, that

the 1955 amendments to sections 16 and 17 apply to a cause of action brought after January 1, 1956, the effective date thereof, even though the action arose prior to such date.

From the allegations of the complaint and the affidavits submitted, it appears that from 1939 to 1953, plaintiffs purchased Addo-X adding machines from Addo for resale. In so doing, they developed a list of customers and dealers which, by the year 1953, had considerable trade value. In 1951 and 1952, because of the volume of plaintiffs' business, Addo made various efforts to obtain the names of plaintiffs' customers and dealers, and its president carried on negotiations with plaintiffs in Chicago to make them exclusive distributors of its adding machines for the Greater Chicago Trading Area, which constituted most of Illinois. Plaintiffs entered into a contract with Addo by which they were appointed its exclusive distributors for such area. The terms of the contract were contained in a letter, dated May 19, 1953, from Addo in New York City, to plaintiffs in Chicago, by which plaintiffs were given the right to purchase the machines at a stated discount from list price, with an additional five percent discount to provide for dealer development. The letter provided for the cancellation of the exclusive distributorship by either party on three months notice, but in the event of cancellation, plaintiffs were to be given the privilege of continuing to purchase the machines on a dealer basis for a reasonable time. After considerable importuning, on July 24, 1953, plaintiff gave Addo their list of customers and dealers upon assurance that Addo would fully protect their rights therein.

The complaint further alleges that plaintiff thereafter entered into various sales efforts in the promotion and sale of Addo's product whereby valuable accounts were obtained; that from 1953 to 1955, plaintiffs purchased

machines for resale in Illinois having a retail value in excess of $150,000; that on July 1, 1955, Addo cancelled plaintiffs' exclusive distributorship as of October 1, 1955, and appointed two of plaintiffs' former dealers, the individual defendants, Berg and Hanson, as its distributors, effective August 1, 1955, two months in advance of such effective termination date; that prior to such termination, Addo wrongfully used the plaintiffs' customer and dealer lists by giving them to its newly appointed distributors for the purpose of circularizing their appointment and obtaining plaintiffs' customers and dealers; and that on January 20, 1956, Addo refused to fill any orders of plaintiffs, despite the agreement made that they might continue to purchase machines directly at dealer discount for a reasonable time.

The issues in this case concern the applicability of the 1955 amendments to sections 16 and 17 of the Civil Practice Act. (Ill. Rev. Stat. 1955, chap. 110, pars. 16, 17.) As amended, those sections authorize the entry of judgments *in personam* on personal service of summons outside the State in enumerated classes of cases.

The applicable part of section 17 is as follows:

"(1) Any person, whether or not a citizen or resident of this State, who in person or through an agent does any of the acts hereinafter enumerated, thereby submits said person, and, if an individual, his personal representative, to the jurisdiction of the courts of this State as to any cause of action arising from the doing of any of said acts:

"(a) The transaction of any business within this State; * * *

"(2) Service of process upon any person who is subject to the jurisdiction of the courts of this State, as provided in this section, may be made by personally serving the summons upon the defendant outside this State, as

provided in this Act, with the same force and effect as though summons had been personally served within this State.

"(3) Only causes of action arising from acts enumerated herein may be asserted against a defendant in an action in which jurisdiction over him is based upon this section.

"(4) Nothing herein contained limits or affects the right to serve any process in any other manner now or hereafter provided by law."

The pertinent part of section 16 is as follows:

"(1) Personal service of summons may be made upon any party outside the State. If upon a citizen or resident of this State or upon a person who has submitted to the jurisdiction of the courts of this State, it shall have the force and effect of personal service of summons within this State; otherwise it shall have the force and effect of service by publication."

Mr. Chief Justice Stone stated in *International Shoe Co.* v. *Washington*, 326 U. S. 310, 66 S. Ct. 154, 90 L. ed. 95, "Historically the jurisdiction of courts to render judgment in personam is grounded on their de facto power over the defendant's person. Hence his presence within the territorial jurisdiction of a court was a prerequisite to its rendition of a judgment personally binding him," citing *Pennoyer* v. *Neff*, 95 U. S. 714, 733, 24 L. ed. 565, 572.

Since *Pennoyer* v. *Neff*, significant social, technological, and legal developments have occurred. These new developments have necessitated a re-examination of former rigid concepts of *in personam* jurisdiction. However, in attempting to re-evaluate the concepts of *in personam* jurisdiction, in the light of changes in our modern complex society, many courts resorted to numerous fictions such as the granting of consent to be sued.

In the *International Shoe Co. case* the court made fiction yield to forthright and realistic considerations of fairness in the determination of what constitutes jurisdiction to determine personal rights. "Whether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure. That clause does not contemplate that a state may make binding a judgment in personam against an individual or corporate defendant with which the state has no contacts, ties or relations. * * * But to the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state. The exercise of that privilege may give rise to obligations, and, so far as those obligations arise out of or are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue." (at p. 319)

Thus, due process requires only that, in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he must have certain minimum contacts with it so that the maintenance of the action does not offend traditional notions of fair play and substantial justice, and, in addition, that the defendant be properly notified of the action against him so that he may adequately defend himself.

In *Nelson* v. *Miller*, 11 Ill. 2d 378, this court held that sections 16 and 17 of the Civil Practice Act reflect a conscious purpose to assert jurisdiction over nonresident defendants to the extent permitted by the due process clause. In order to satisfy due process there must be minimum contacts with the State plus adequate notice to defend. There is no doubt that sections 16 and 17 afford adequate notice, since there is provision for personal service.

While the constitutional question is always present in determining whether a State, consistent with due process, can enter an *in personam* judgment against a nonresident defendant; nevertheless it is important to avoid placing the cart before the horse. If, for example, there are no minimum contacts with the State in a particular case, it will be unnecessary to decide whether the State, consistent with due process, can assume jurisdiction, unless the State assumes jurisdiction erroneously, and thereby violates due process.

In the case of *International Shoe Co. v. Washington*, a nonresident corporation employed resident salesmen in the State of Washington to take orders for merchandise and to solicit orders, but without authority to enter into contracts in that State. The orders were transmitted to the office of the corporation in St. Louis, Missouri, for acceptance or rejection. The defendant did not deliver goods in Washington, but shipped them F. O. B. from outside the State. The salesmen whom defendant engaged in Washington were hired for full time employment by the defendant, and the salesmen rented display rooms within the State, for the cost of which they were reimbursed by the defendant. Their commissions for the years in question exceeded $31,000 per annum. On these facts, the State of Washington sought to recover unemployment compensation taxes from International Shoe, based upon the compensation paid to its salesmen as commissions during those years. The shoe company was served with notice by personal service upon one of its salesmen within the State and by registered mail at its St. Louis office. The corporation appeared specially to contest the jurisdiction of the State to assess the tax and to challenge the *in personam* jurisdiction of the Washington tribunals. Throughout the State proceedings, the shoe company asserted that the due process clause proscribed the State's legislative jurisdiction and that the due process

clause prevented the State from asserting personal jurisdiction over the corporation. After judgment against it in the Washington Supreme Court (22 Wash. 2d 146, 154 P. 2d 801), the shoe company appealed to the Supreme Court of the United States. Mr. Chief Justice Stone speaking for the court stated: "that the criteria by which we mark the boundary line between those activities which justify the subjection of a corporation to suit, and those which do not, cannot be simply mechanical or quantitative. The test is not merely, as has sometimes been suggested, whether the activity, which the corporation has seen fit to procure through its agents in another state, is a little more or a little less. [Citations.] Whether due process is satisfied, must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure. *That clause does not contemplate that a state may make binding a judgment in personam against an individual or corporate defendant with which the state has no contacts, ties or relations.*" (Emphasis supplied.) 326 U. S. 310, at 319.

In upholding the jurisdiction by Washington over the defendant corporation, the United States Supreme Court decided that the activities carried on in behalf of International Shoe in the State of Washington were neither irregular nor casual. "They were systematic and continuous throughout the years in question. They resulted in a large volume of interstate business, in the course of which appellant received the benefits and protection of the laws of the state, including the right to resort to the courts for the enforcement of its right. The obligation which is here sued upon arose out of those very activities. It is evident that these operations establish sufficient contacts or ties with the state of the forum to make it reasonable and just according to our traditional conception of fair play and substantial justice to permit the state to enforce the obligations which

appellant has incurred there. Hence we cannot say that the maintenance of the present suit in the State of Washington involves an unreasonable or undue procedure." 326 U. S. 310, 320, 90 L. ed. 95, 104.

In *McGee* v. *International Life Insurance Co.*, 355 U. S. 220, 78 S. Ct. 199, 2 L. ed. 2d 223, the United States Supreme Court held that the State of California acquired *in personam* jurisdiction over the defendant foreign corporation by defendant's issuance of an insurance policy to a California resident. The issuance of this single policy was deemed sufficient contact with the State to subject defendant corporation to personal jurisdiction within the State.

We have, indeed, come far from the doctrine of the *in personam* jurisdiction enunciated in *Pennoyer* v. *Neff*, 95 U. S. 714. However, as Mr. Chief Justice Warren asserted in *Hanson* v. *Denckla*, 357 U. S. 235, 251, 2 L. ed. 2d 1283, 1296, 78 S. Ct. 1228, "it is a mistake to assume that this trend heralds the eventual demise of all restrictions on the personal jurisdiction of state courts."

In the *Hanson* case, the validity of a trust, created in 1935, was contested. The settlor, a resident of Pennsylvania, executed a trust agreement in Delaware and designated a Delaware corporation as trustee. The corpus of the trust consisted of securities from which the settlor reserved the income for life with remainder to such persons as she might appoint by *inter vivos* or testamentary power, and she reserved the right to change the trustee and amend or revoke the trust at any time.

In 1944, the settlor removed to Florida and lived there until her death in 1952. The assets of the trust remained in Delaware and the trustee performed no acts in Florida. In 1949, the settlor executed a power of appointment whereby $400,000 of the trust remainder was appointed to named trust companies for certain beneficiaries. On the same day,

she executed a will giving the residue of her estate, including any interests over which she had power of appointment which had not been effectively exercised prior to her death, to named legatees. Her will was probated in Florida. The Delaware trustee paid out $400,000 to the appointed trust companies in Delaware as provided in the power of appointment.

Months later, the legatees under the will brought an action in a Florida State court for a declaratory judgment as to what property passed under the settlor's will, contending that the power of appointment with reference to the trust was void and that the $400,000 in controversy was a part of the assets of the estate. Service by mail was had upon the Delaware trustee in accordance with the Florida constructive service statute. The Florida Supreme Court affirmed the Florida chancery court's conclusion that the Delaware trust was void under Florida law and the power of appointment ineffective, but reversed the chancellor's ruling that Florida lacked jurisdiction over the trustee and found it unnecessary to determine that question. *Hanson v. Denckla* (Fla. 1956), 100 So. 2d 378.

During the Florida proceedings, a suit was instituted in a Delaware State court seeking declaratory judgment as to who was entitled to the trust assets held in that State. The Delaware chancellor refused to give full faith and credit to the Florida judgment, and held that the Florida court was without jurisdiction to decide the issue of the disposition of the Delaware trust. The Delaware Supreme Court affirmed the chancellor. *Lewis v. Hanson* (Del. 1957), 128 A. 2d 819.

The United States Supreme Court granted *certiorari* in each of the cases and consolidated them for hearing and opinion. It held that, under the facts of the case, Florida could not exercise jurisdiction over the Delaware trustee

without violation of the due process clause of the 14th amendment; that under Florida law the Delaware trustee was an indispensable party to the suit; and that the Florida judgment was void and must be reversed. Under the same reasoning the court affirmed the Delaware judgment and held that the Delaware court was not required to give full faith and credit to the Florida judgment, which was void for want of jurisdiction over the trustee and the trust *res*, and therefore offensive to due process.

The majority opinion in *Hanson* v. *Denckla* (See: Kurland, The Supreme Court, The Due Process Clause and the In Personam Jurisdiction of State Courts from Pennoyer to Denckla, 25 U. of Chi. L. Rev. 569, 610, and Brown, The Supreme Court, 1957 Term, 72 Harvard Law Review 77, 195-198), specifically rejects the notion of a parallel between *forum non conveniens* and the appropriate forum under the due process clause: "Those restrictions [on *in personam* jurisdiction] are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States. However minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he has had the 'minimal contacts' with that State that are a prerequisite to its exercise of power over him." (357 U. S. 235, at p. 251.) For Mr. Chief Justice Warren and the majority, the test was whether there were sufficient contacts between the nonresident defendant and Florida to warrant Florida in its exercise of power over him. "The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State. The application of that rule will vary with the quality and nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting

activities within the forum State, thus invoking the benefits and protections of its laws. [Citation.] The settlor's execution in Florida of her power of appointment cannot remedy the absence of such an act in this case." (357 U. S. 235, at pp. 253-254.)

The decision in the case of *Hanson* v. *Denckla*, was undoubtedly influenced by the fact that the defendant trust company had no office in Florida, and transacted no business there. None of the trust assets had ever been held or administered in Florida, and the record disclosed no solicitation in that State either in person or by mail.

Accordingly, in *Hanson* v. *Denckla*, the case is not one that arises out of an act done or a transaction consummated in the forum State. Although the language of "reasonableness," "fair play," and "minimum contacts" shows that the concepts of *in personam* jurisdiction have been greatly altered since *Pennoyer* v. *Neff*, *Hanson* v. *Denckla* stands for the proposition that there are still important territorial limitations on a State's power of *in personam* jurisdiction.

In the instant case, Addo contends that it has not subjected itself to the jurisdiction of the Illinois courts. *Hanson* v. *Denckla*, setting out limitations on a State's power in *in personam jurisdiction*, supports this contention.

In the present case, the record shows that the defendant, Addo Machine Company, Inc., is a corporation organized conformably to the laws of the State of New York and domiciled in that State. It is not licensed to do business within the State of Illinois. It manufactures adding machines outside of Illinois and ships these machines to purchasers throughout the United States. It does not and has not at any time maintained any offices in Illinois, nor employed any officers, agents or employees or other persons within the State. From May 19, 1953, defendant, pursuant

to the letter of that date addressed to plaintiffs, began to sell its machines to plaintiffs at a distributor discount rate. The sales were consummated when plaintiffs placed orders with the defendant in New York, and defendant accepted the orders, delivering its product to independent carriers in New York. On or about July 1, 1955, defendant advised plaintiffs that beginning October 1, 1955, they would no longer be exclusive distributors of defendant's products in the Greater Chicago Trading Area, and after the latter date defendant sold its machines at a distributor level and to the individual defendants and to other distributors. Defendant did not at any time own any interest in any corporation, partnership, or individual distributing its products in Illinois, and did not at any time have the right to exercise any control over the distributors; the relationship between defendant and distributor being that of seller and purchaser. After October 1, 1955, the defendant continued to sell equipment to plaintiffs on a dealer price level until January 1, 1956, when it declined to accept any further orders from plaintiffs.

We concur in the conclusion of the Appellate Court that plaintiffs were not doing business in Illinois as defendant's agents. They were independent businessmen in Illinois selling their own merchandise which had been manufactured by the defendant. They were not transacting business for the defendant in Illinois; they were transacting business for themselves. In the case of *International Shoe Co.* the defendant's salesmen were employed in the State of Washington. In *Nelson v. Miller*, 11 Ill. 2d 378, the defendant's agent was in Illinois and his activity here gave rise to the injury for which the action was brought.

As recently announced by the United States Supreme Court, in the *Hanson* case, there are still territorial limitations to a State's *in personam* jurisdiction. Since Addo did not have "minimum contacts" with the State of Illinois,

jurisdiction of the Illinois courts.

Our conclusion that Addo was not transacting business in Illinois renders unnecessary a consideration of its additional contention that the contract of May 19, 1953, between it and plaintiffs was void for lack of mutuality.

The judgment of the Appellate Court is affirmed.

*Judgment affirmed.*

Mr. JUSTICE DAVIS, dissenting:

I dissent from the decision of the court which I believe to be an unrequired limitation upon the salutary purpose of sections 16 and 17 of the Civil Practice Act. The opinion finds that the due process clause of the Fourteenth amendment to the United States constitution prohibits the exercise of jurisdiction by the Illinois courts in this case. I do not agree.

Within a three-year period, Addo, a large manufacturing company, shipped $150,000 worth of machines into Illinois. In order to stimulate a greater demand for its products here, it named plaintiffs as its exclusive distributor in the Greater Chicago Trading Area. Addo had close, continuous and important business contacts with the Illinois plaintiffs, its distributors. The contract between the parties contemplated that the plaintiffs would use their efforts to get other persons or corporations in Illinois to engage in the sale of Addo's products, and provided a specific compensation in the form of an additional discount, for plaintiffs' efforts in this respect. The president of Addo negotiated in Illinois to establish this business relationship; it made commitments to plaintiffs concerning activities to be performed almost solely in this State; it exacted from plaintiffs a list of their dealers in Illinois, and then, for its own benefit, terminated its relationship with the plaintiffs and set up a different method of merchandising.

Regardless of the legal right to control the manner and method of distribution, the sole manufacturer of a product may exert compelling influence on the activities of its distributors by shutting off their source of supply. It is alleged in the complaint that this was done by Addo in violation of the terms of the contract between the parties. While Addo contends that the legal nature of the distribution was merely one for the sale of goods, it is charged in the complaint that there was a continuing relationship between Addo and the plaintiffs which extended beyond that of buyer and seller and in this case the contract specifically provided, as the opinion of the court points out, for "dealer development."

Under the allegations of the complaint, the individual defendants, Berg and Hanson, Illinois residents, with full knowledge of plaintiffs' contractual relationship with Addo, wrongfully induced the termination and breach of Addo's contract with plaintiffs by causing their own appointment as Addo's distributor, by participating in and adopting the benefit of the list of dealers supplied by plaintiffs to Addo, by interfering with customer relations between plaintiffs and certain of their valuable accounts, and by causing Addo to breach its contract to continue plaintiffs as a dealer of Addo-X adding machines for a reasonable time following any termination of plaintiffs' contract of distributorship. The presence of the individual resident defendants, as parties, argues in favor of jurisdiction, as does the inability of plaintiffs to join them as parties defendant in any proceedings instituted against Addo in the State of New York.

The cause of action sought to be enforced arises out of activities in this State in connection with the relationship. This is not an action by a third party arising out of the sale of Addo's machines by plaintiffs. Rather, it is the business relationship between the plaintiffs and Addo which constitutes the qualifying contact with the forum.

I submit that these facts constitute minimum contacts with the forum required by *International Shoe Co.* v. *Washington*, 326 U. S. 310, 90 L. ed. 95. Addo's ties with Illinois were at least as great as in *McGee* v. *International Life Insurance Co.*, 355 U. S. 220, 2 L. ed. 2d 223; *Perkins* v. *Benguet Consolidated Mining Co.*, 342 U. S. 437, 96 L. ed. 485, and *Travelers Health Association* v. *Virginia*, 339 U. S. 643, 94 L. ed. 1154.

I am convinced that this court was right in *Nelson* v. *Miller*, 11 Ill. 2d 378, 389, where it stated: "Sections 16 and 17 of the Civil Practice Act reflect a conscious purpose to assert jurisdiction over nonresident defendants to the extent permitted by the due-process clause." This view is supported by the commentators on the section. (Cleary and Seder, Extended Jurisdictional Bases for Illinois Courts, 50 N. U. L. R. 599; Joint Committee Comments, Smith-Hurd. Anno. Stat., chap. 110, par. 17, p. 164; Jenner and Tone, Historical and Practice Notes, Smith-Hurd Anno. Stat., chap. 110, par. 17, p. 165; Expanded Concepts of State Jurisdiction over Nonresidents, O'Connor & Goff, 31 Notre Dame Lawyer, 223.) In *Nelson* we noted that with the change of social, technological, and legal developments, the rigid concepts of *Pennoyer* v. *Neff* yielded to fiction, and fiction in turn yielded to the realistic considerations of fairness under the minimum contact doctrine established by *International Shoe*. And, at page 384 we stated: "The foundations of jurisdiction include the interest that a State has in providing redress in its own courts against persons who inflict injuries upon, or otherwise incur obligations to, those within the ambit of the State's legitimate protective policy. The limits on the exercise of jurisdiction are not 'mechanical or quantitative' (*International Shoe Co.* v. *Washington*, 326 U. S. 310, 319 (1945),) but are to be found only in the requirement that the provisions made for this purpose must be fair and reasonable in the circum-

stances, and must give to the defendant adequate notice of the claim against him, and an adequate and realistic opportunity to appear and be heard in his defense."

The legislature did not restrict such jurisdiction to actions arising out of express contracts, but has extended the jurisdictional basis to the transaction of any business within the State. (Ill. Rev. Stat. 1957, chap. 110, par. 17(I)(a).) This should be construed to include any business activity sufficient to create the essential minimum contacts with the forum.

The United States Supreme Court has come far from the doctrine of *in personam* jurisdiction enunciated in *Pennoyer v. Neff*, 95 U. S. 714, but as I read the opinion in the case at bar, I cannot but believe that this court is again dealing with the early historic legalistic definition of "doing business" rather than with the concept of "minimal contacts" established in *International Shoe* and *McGee*.

There is nothing in *Hanson v. Denckla*, 357 U. S. 235, 2 L. ed. 2d 1283, which either requires this result, or justifies the court's timorous approach to the practical aspects of *in personam* jurisdiction. If, as we held in *Nelson*, "The foundations of jurisdiction include the interest that a State has in providing redress in its own courts against persons who inflict injuries upon, or otherwise incur obligations to, those within the ambit of the State's legitimate protective policy," then this court should not needlessly render Illinois courts impotent to serve our residents by reason of a supposed compulsion stemming from the Fourteenth amendment. That *Hanson* involves an entirely different problem is apparent from the discussion of that case in the court's opinion.

In *International Shoe*, 326 U. S. 310, at page 319, Chief Justice Stone, speaking for the court, stated: "But to the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and

protection of the laws of that state. The exercise of that privilege may give rise to obligations, and, so far as those obligations arise out of or are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue."

I would sustain jurisdiction, reverse the trial court and remand the cause with directions to deny the motion to quash.

Mr. Justice Schaefer joins in this dissent.

U. S. A. v. Fisons, et al. C. A. 69 C 1530, N. D. Ill.

## COMPLAINT.

The United States of America, plaintiff, by its attorneys, acting under the direction of the Attorney General of the United States, brings this civil action against the defendants named herein and complains and alleges as follows:

### I. Jurisdiction and Venue.

1. This complaint is filed and this action is instituted pursuant to Section 4 of the Sherman Act (15 U. S. C. § 4) in order to prevent and restrain the defendants from violation of Section 1 of the Sherman Act (15 U. S. C. § 1).

2. Colgate-Palmolive Company (hereafter referred to as "Colgate"), Armour and Company (hereafter referred to as "Armour"), and American Home Products Corporation (hereafter referred to as "AMHO") are found in and transact business in the Northern District of Illinois.

3. Fisons Limited and Fisons Pharmaceuticals Limited transact business in Illinois sufficiently to satisfy the jurisdictional requirements of Section 17(1)(a) of the Illinois Civil Practice Act (*Ill. Rev. Stat.*, ch. 110 § 17(1)(a) (1957)) by the maintenance of continuing agreements, which have a substantial effect on the economy of Illinois, and are alleged as violations of the Sherman Act in this complaint, with Colgate, Armour, and AMHO, all of which are found in and do business in Illinois and one of which, Armour, has its principal place of business in Illinois; by the continuing exportation into the United States for resale in Illinois of certain patented products that are the subject matter of the aforementioned agreements, the sale of which has a substantial effect on the economy of Illinois; and by the transaction of business in Illinois relating to the aforementioned agreements by officers of Fisons

Ltd., Fisons Pharmaceuticals Ltd. and of its predecessor Benger Laboratories Limited (hereafter referred to as "Benger"), who frequently physically enter Illinois for this purpose.

## II. Defendants.

4. The defendant Fisons Limited is a corporation of Great Britain, with its principal place of business at Harvest House, Felixstowe, Suffolk, England. The defendant Fisons Pharmaceuticals Limited is a corporation wholly owned and controlled by Fisons Limited with its principal place of business at Loughborough, Leicestershire, England. Fisons Limited and Fisons Pharmaceuticals Limited are hereafter collectively referred to as "Fisons." In 1964, Fisons acquired Benger, a corporation of Great Britain, and merged it into Fisons Pharmaceuticals Limited. Fisons is extensively engaged in the manufacture and sale of pharmaceutical products for human and animal use.

5. The defendant Colgate is a Delaware corporation, with its principal place of business at New York, New York. On February 1, 1960, Colgate acquired Lakeside Laboratories, Inc. (hereafter referred to as "Lakeside"), a Delaware corporation, and on January 15, 1964, it was merged into Colgate. Colgate is extensively engaged in the manufacture and sale of pharmaceutical products for human and animal use.

6. The defendant Armour is a Delaware corporation, with its principal place of business at Chicago, Illinois. Armour is extensively engaged in the manufacture and sale of pharmaceutical products for human and animal use.

7. The defendant AMHO is a Delaware corporation, with its principal place of business at New York, New York. AMHO wholly owns and controls Fort Dodge La-

boratories, Inc. (hereafter referred to as "Fort Dodge"), a Delaware corporation. AMHO is extensively engaged in the manufacture and sale of pharmaceutical products for human and animal use.

## III. Definitions.

8. As used in this complaint:

(a) "Iron Dextran" means colloidal ferric hydroxide complexed with depolymerized dextran.

(b) "Dosage form" means capsules, tablets, ampuls, and other forms of packaging pharmaceutical products for administration to or by the consumer or ultimate recipient thereof.

(c) "Bulk form" means the form in which pharmaceutical products are manufactured prior to their being packaged into dosage form.

(d) "Veterinary use" and "veterinary purposes" means the application of pharmaceutical products for the prevention or treatment of diseases in animals or for the purpose of promoting animal production.

(e) "Human use" means the application of pharmaceutical products for the prevention or treatment of diseases in human beings.

(f) "Licensee defendants" refers to Armour and AMHO.

## IV. Nature of Trade and Commerce.

9. Iron preparations are used in the treatment of iron deficiency conditions, including anemia. Anemia may occur in human beings or in animals. Iron dextran has no advantage over other iron injectable preparations of combining the features of being nontoxic, rapidly dissociated, retained in the system, and fully used

10. On January 21, 1958, Benger was granted United States Patent No. 2,820,740 (subsequently reissued as U. S. Patent No. RE 24,642), covering iron dextran.

11. Colgate, Armour, and AMHO buy iron dextran in finished dosage form from Fisons, which exports it from Great Britain to their plants located in the United States. These companies place labels on the finished dosage form product and distribute it across state lines for sale to purchasers located throughout the country. In 1967 total sales of such products by Colgate, Armour, and AMHO amounted to approximately $3.2 million.

12. Colgate sells dosage-form iron dextran for human use only under the trademark "Imferon." In 1967 such Colgate sales amounted to approximately $1.4 million.

13. Armour sells dosage-form iron dextran for veterinary use only through three channels of distribution—(1) through licensed veterinarians under the trademark "Nonemic"; (2) on an over-the-counter basis, through drug, feed, and farm supply stores, under the trademark "Armidexan"; and (3) through sublicensees and distributors under private labels or by generic name only. In 1967 Armour's sales through such channels of distribution amounted to approximately $185,000, $610,000, and $850,000, respectively.

14. AMHO sells dosage-form iron dextran under the trademark "Ferrextran," for distribution through licensed veterinarians only. In 1967, such AMHO sales amounted to approximately $120,000.

## V. Violations.

15. Beginning at least as early as 1956, and continuing thereafter until the date of the filing of this complaint, the defendant Fisons has entered into an unlawful combination and contracts with defendants Colgate, Armour, and

AM110 in unreasonable restraint of the aforesaid trade and commerce in iron dextran in violation of Section 1 of the Sherman Act.

16. Each of these contracts contains one or more of the following agreements, among others:

(a) to allocate markets in the distribution and sale of iron dextran;

(b) to restrict and prevent the resale of iron dextran in bulk;

(c) to require purchasers of iron dextran to resell under a specified trademark in some cases and under other than a specified trademark in other cases;

(d) to grant additional licenses only with the consent of existing licensees;

(e) to transfer to Fisons all trademarks, whether owned by Fisons or by one of its licensees, relating to iron dextran upon the expiration of the license agreements;

(f) to refrain from contesting the validity, use, and transfer of trademarks.

Said unlawful arrangements, restrictions, and agreements are embodied in part in the licenses described in paragraphs 17 to 20.

17. On June 20, 1956, Benger and Lakeside entered into an agreement in which Benger exclusively authorized Lakeside to make, use, and sell iron dextran, on which Benger had applied for but not yet been granted a United States patent. In such agreement, Lakeside expressly undertook "not to manufacture or sell or distribute the product for veterinary use." Lakeside further agreed to sell iron dextran only in dosage for a and only under the trademark "Inferon"; not to use that trademark after the termination of the agreement; not to raise any question concern

ing or objection to the validity of the trademark, on any ground, or to its use by Benger or any licensee thereof; and not to oppose any future application for the registration of such trademark.

18. On December 15, 1956, Benger and Armour entered into an agreement, in which Benger exclusively authorized Armour to make, use, and sell iron dextran "limited to the right to make, use and sell products for veterinary purposes only." Armour agreed not to sell or distribute iron dextran, nor permit it to be sold or distributed, except in dosage form and bearing a label that the product was sold for veterinary use. Armour further agreed to transfer to Benger, upon the termination of the contract, all Armour trademarks relating to iron dextran; not to use any such trademark thereafter; not to raise any question concerning or objection to the validity of such trademarks or of the trademark "Inferon," on any ground, or to the use thereof by Benger or any licensee thereof; and not to oppose any future application for registration of such trademarks.

19. On March 11, 1959, Benger and Armour executed a modification of their agreement of December 15, 1956, under which Armour had enjoyed an exclusive license from Benger to make, use, and sell iron dextran for veterinary use. The parties agreed that Benger would be entitled to grant a license to Fort Dodge to sell iron dextran to veterinarians and to distributors who sell only to veterinarians. In other respects, however, the parties agreed that the prior agreement "shall be deemed to continue as an exclusive license."

20. On the same date, Benger granted to Fort Dodge, pursuant to the agreement between Benger and Armour described in the preceding paragraph, a license for Fort Dodge to sell iron dextran purchased from Benger or a license thereof. The license expressly provided that it was "limited to the sale to veterinarians only, and to distribu-

tors for resale to veterinarians." Fort Dodge agreed to sell iron dextran for veterinary purposes only, and not to make or sell it otherwise; not to sell or distribute iron dextran or permit it to be sold or distributed in bulk, or otherwise than in dosage form bearing a lable indicating that the product was for veterinary use; to transfer to Benger, upon termination of the agreement, all Fort Dodge trademarks relating to iron dextran; not to use any such trademark thereafter; not to raise any question concerning or objection to the validity of such trademark or of the trademark "Inferon," on any ground, nor to use thereof by Benger or any licensee thereof; and not to oppose any future application for registration of such trademarks.

21. The defendants have acted in accordance with the aforesaid agreements and they will continue to so act unless restrained by order of this Court.

## VI. Effects.

22. The effects of the aforesaid violations have been, are, and will be, among others:

(a) after iron dextran has passed beyond the control of the patent monopoly into the stream of commerce, the purchasers of iron dextran are restricted in the channels of distribution through which and persons to whom, they may sell iron dextran;

(b) licensee defendants are prevented from competing in the sale of iron dextran in bulk form and third persons are prevented from obtaining iron dextran in bulk form and from packaging and reselling it to consumers;

(c) licensee defendants are restricted in the channels of distribution through which, and the persons to whom, they may resell iron dextran;

(d) third persons are deprived of the opportunity to be licensed or sublicensed to sell iron dextran without the prior approval of licensees of Fisons;

(e) competition between Fisons and the other defendants will be restrained by the wholesale transfer, upon the expiration of the patent on iron dextran, of all of the other defendants' trademarks on iron dextran to Fisons;

(f) Fisons will upon the expiration of the patent on iron dextran aggregate to itself the goodwill acquired by the other defendants in their respective trademarks on iron dextran;

(g) the validity, use, and transfer of trademarks will be insulated from legal challenge;

(h) the public will be deprived of the benefits of free and open competition in iron dextran.

PRAYER.

Wherefore, plaintiff prays:

1. That the Court adjudge and decree that the combination and contracts alleged in paragraphs 15 through 20 are in unreasonable restraint of trade, in violation of Section 1 of the Sherman Act.

2. That each defendant be permanently enjoined from entering into or maintaining any agreement or understanding with any person, the effect of which is to:

(a) divide or allocate any markets in the distribution and sale of iron dextran or of any other pharmaceutical product;

(b) restrict the persons to whom, or the channels of distribution through which, iron dextran or any other pharmaceutical product may be resold;

(*e*). restrict the resale of iron dextran or any other pharmaceutical product in bulk form.

3. That defendant Fisons be ordered to grant licenses on reasonable terms, and at reasonable, nondiscriminatory royalty rates, to all *bona fide* applicants therefor, on all United States patents it now owns, has already applied for, or has the right to license, which relate to the manufacture, use, or sale of iron dextran; and that it make available to such licensees the know-how relating to iron dextran manufacture, in the possession or control of said defendant.

4. That defendant Fisons, for the five years following the entry of final judgment, be required to sell iron dextran, on nondiscriminatory terms, to each *bona fide* applicant therefor.

5. That defendants be permanently enjoined from entering into or maintaining any agreement or understanding with any person, in respect to any United States patent, other than an agreement for a sole and exclusive license under such patent, that any third party or parties will not be licensed under such patent or will be so licensed only upon the approval of another person licensed under such patent.

6. That defendants be permanently enjointed from entering into or maintaining any agreement or understanding requiring any person to use only a specified trademark on a pharmaceutical product which such person purchases or manufactures.

7. That defendants be enjoined from entering into any agreement whereby any licensee is required to transfer to its licensor any trademark relating to a pharmaceutical product as a condition to obtaining a license, where said trademark was not originally conveyed by said licensor to said licensee.

8. That each defendant be permanently enjoined from entering into or maintaining any agreement which provides that any party thereto will not contest the validity of any trademark, nor challenge the manner of its use.

9. That the plaintiff have such other and further relief as the nature of the case may require and the Court may deem just and proper.

10. That the plaintiff recover the costs of this suit.

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# In the Supreme Court of the United States

OCTOBER TERM, 1971

FISONS LIMITED AND FISONS PHARMACEUTICALS, LTD., PETITIONERS

*v.*

UNITED STATES OF AMERICA

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

---

## BRIEF FOR THE UNITED STATES IN OPPOSITION

---

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# In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-971

FISON'S LIMITED AND FISONS PHARMACEUTICALS, LTD., PETITIONERS

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A3-A21) is not yet reported. The order of the district court (Pet. App. A1-A2) is unreported.

### JURISDICTION

The judgment of the court of appeals was entered on January 5, 1972. The petition for a writ of certiorari was filed January 31, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTION PRESENTED

Whether on the facts of this case the court of appeals correctly held that under the Illinois long-arm statute the district court had personal jurisdiction over two non-resident corporations named as defendants in a government antitrust suit.

## STATUTES AND RULES INVOLVED

F.R. Civ. P. 4(e) provides in pertinent part:

> (e) Same: Service Upon a Party not Inhabitant of or Found Within State.
>
> Whenever a statute of the United States or an order of court thereunder provides for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state in which the district court is held, service may be made under the circumstances and in the manner prescribed by the statute or order, or, if there is no provision therein prescribing the manner of service, in a manner stated in this rule. Whenever a statute or rule of court of the state in which the district court is held provides (1) for service of a summons, or a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state, or (2) for service upon or notice to him to appear and respond or defend in an action by reason of the attachment or garnishment or similar seizure of his property located within the state, service may in either case be made under the circumstances and in the manner prescribed in the statute or rule.

Section 17(1)(a), (1)(b), and (3) of the Illinois Civil Practice Act, Rev. Stat. 1955, Chap. 110, par. 17(1)(a), (1)(b), and (3), provides:

> (1) Any person whether or not a citizen or resident of this State, who in person or through an agent does any of the acts hereinafter enumerated, thereby submits such person, and if an individual, his personal representative, to the jurisdiction of the courts of this State as to any such acts:
>
> (a) The transaction of any business within this State;
>
> (b) The commission of a tortious act within this State;
>
> * * *
>
> (3) Only causes of action arising from acts enumerated herein may be asserted against a defendant in an action in which jurisdiction over him is based upon this Section.

**STATEMENT**

On July 29, 1969, the United States filed a civil complaint (Pet. App. A39-A48) charging two British corporations, petitioners Fisons Limited and its subsidiary, Fisons Pharmaceuticals, Ltd., with violating Section 1 of the Sherman Act by entering into restrictive licensing agreements for the manufacture, distribution and sale of iron dextran, a patented iron supplement,[1] with three American firms, Armour and

[1] Iron dextran, upon which United States Patent No. 2,820,740 was issued to another Fisons Limited subsidiary in 1958, is used in the treatment of anemia and other iron deficiency conditions in humans and certain livestock, particularly hogs.

Company, Colgate-Palmolive Co., and American Home Products Corp. The complaint alleged that trade in iron dextran has been unreasonably restrained since 1956 as a result of the license agreements, which allocate markets, restrict sales in bulk form, condition the grant of additional licenses, and control the validity, use and transfer of all license trademarks. The complaint named each of the five corporations as a defendant. Jurisdiction over the petitioner corporations was asserted pursuant to F.R. Civ. P. 4(e) and Section 17(1)(a) of the Illinois Civil Practice Act, Ill. Rev. Stat. 1955, Chap. 110, par. 17(1)(a)—the Illinois long-arm statute.

Appearing specially to contest the *in personam* jurisdiction of the district court, petitioners filed a motion to quash service of process and to dismiss the complaint.[2] Extensive discovery directed to the jurisdictional issue ensued. On August 6, 1971, on the basis of various documents, depositions and affidavits, and after full briefing and argument, the district court denied the motions in a brief order. At petitioners' request, the district court revised its order (Pet. App. A1-A2) to include a certification for an interlocutory appeal to the court of appeals pursuant to the Interlocutory Appeals Act, 28 U.S.C. 1292(b).

On petitioners' appeal, the government contended that the direct appeal provisions of the Expediting Act (15 U.S.C. 29) foreclosed interlocutory appeals

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[2] The three American defendants filed separate answers in which they admitted, *inter alia*, the jurisdiction of the district court.

to the courts of appeals in civil antitrust suits brought by the United States. The government also contended that the district court had correctly ruled that it had jurisdiction under the Illinois long-arm statute.

The court of appeals affirmed (A3-A21). The court first held that it had jurisdiction under the Interlocutory Appeals Act, and that the question certified by the district court was appropriate for interlocutory review.

As to the merits of the appeal, the court held that "the record discloses a sufficient relationship between [the Fisons firms] and the transaction of business in Illinois to subject them to federal jurisdiction in the court below" (Pet. App. A18). It found that the petitioners' patent license agreements with the American companies contained provisions that controlled aspects of the licensees' business activities and created a continuing relationship, including a significant measure of control over such activities in Illinois, sufficient to sustain jurisdiction. The court further held, under *Nelson* v. *Miller*, 11 Ill. 2d 378, 143 N.E. 2d 672, 679, that Section 16 and Section 17, the long-arm provision, "of the Illinois Civil Practice Act reflected a conscious purpose to assert jurisdiction over nonresident defendants to the extent permitted by the due process clause" (Pet. App. A17). The court therefore concluded that the scope of the Illinois statute is measured by federal standards and that *Grobark* v. *Addo Machine Co.*, 16 Ill. 2d 426, 158 N.E. 2d 73, was not binding on a federal court because there the state court determined the reach of the long-arm statute by reference to limitations in federal law. Moreover, *Grobark*

had been undermined by more recent decisions and was, in any event, factually distinguishable because the contractual elements of control dispositive here were not present in that case.

## ARGUMENT

With respect to the jurisdiction of the courts of appeals over interlocutory appeals under 28 U.S.C. 1292(b) in government antitrust cases subject to the Expediting Act, the decision below conflicts with *Farbenfabriken Bayer, A. G.* v. *United States*, 1968 Trade Cases ¶72,570 (C.A.D.C.), certiorari denied, 393 U.S. 959; and *Tidewater Oil Co.* v. *United States*, C.A. 9, Misc. No. 9751, certiorari denied, 404 U.S. 941, motion for leave to file out of time petition for rehearing pending, No. 71-366, O.T. 1971. This issue, however, is not presented by the petition because the court of appeals decided it in petitioners' favor. Although the government contested the court of appeals' jurisdiction, it did not petition independently on this issue because it was the successful party on the merits. The issue that is presented by the petition—the application of the Illinois long-arm statute to the facts of this case—is not of general importance and does not warrant review by this Court. Accordingly, the petition for a writ of certiorari should be denied.[4]

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[3] *Koplin* v. *Thomas, Haab and Botts*, 73 Ill. App. 2d 242, 219 N.E. 2d 646 (1st Dist.); *Ziegler* v. *Hodges*, 80 Ill. App 2d 210, 224 N.E. 2d 12 (2d Dist.); see *O'Hare International Bank* v. *Hampton*, 437 F.2d 1173, 1176 (C.A. 7); Cf. *Gray* v. *American Radiator & Standard Sanitary Corp.*, 22 Ill. 2d 432, 176 N.E. 2d 761.

[4] If the petition is granted, however, the government will contend

1. Petitioners contend that the decision of the court of appeals, upholding *in personam* federal jurisdiction over petitioners pursuant to the Illinois long-arm statute, conflicts with "the majority opinion of the latest decision of the Illinois Supreme Court" (Pet. 5-6) [5] in *Grobark* v. *Addo Machine Co.*, 16 Ill. 2d 426, 158 N.E. 2d 73 (1959). The reach of Section 17(1)(a) of the Illinois Civil Practice Act, the long-arm provision involved here, had previously been defined by the Illinois Supreme Court in *Nelson* v. *Miller*, 11 Ill. 2d 378, 143 N.E. 2d 673: "Sections 16 [6] and 17 of the Civil Practice Act reflect a conscious purpose to assert jurisdiction over nonresident defendants to the extent permitted by the due-process clause." 11 Ill. 2d at 389, 143 N.E. 2d at 679. Applying the doctrine announced in *International Shoe Co.* v. *Washington*, 326 U.S. 310, 316,

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that the court of appeals should not have reached the merits of the appeal before it, but should have dismissed for lack of jurisdiction on the ground that the Expediting Act forecloses interlocutory appeals to the courts of appeal under 28 U.S.C. 1292(b). Moreover, on January 21, 1972, Tidewater Oil Company filed a petition in *Tidewater Oil Co.* v. *United States*, *supra*, asking rehearing on the ground of the conflict between the circuits' application of the Interlocutory Appeals Act to civil antitrust cases brought by the United States (Petition for Rehearing, No. 71-366, October Term, 1971). As stated in the Response of the United States to the Petition for Rehearing, filed simultaneously with the present Brief in Opposition, by granting the petition for a writ of certiorari in *Tidewater*, this Court will have an appropriate vehicle by which to resolve the conflict. Because the petition in this case does not present that issue, however, it may be considered without reference to the *Tidewater* case.

[5] As the court of appeals noted, petitioners "raise no question about the form of the process, the manner in which it was served, the adequacy of notice, or venue" (Pet. App. A15).

[6] Section 16 contains the provisions for service of process.

the Illinois Supreme Court there held that the defendant had "certain minimum contacts" with the forum sufficient to subject it to the personal jurisdiction of the state court.

After the state court's decision in *Nelson* v. *Miller*, *supra*, this Court decided two cases involving the requirements of due process in the exercise of *in personam* jurisdiction over non-resident defendants. *McGee* v. *International Life Insurance Co.*, 355 U.S. 220; *Hanson* v. *Denckla*, 357 U.S. 235. Thereafter, in *Grobark*, *supra*, the Illinois Supreme Court held that, consistent with the federal due process principles announced by this Court, personal jurisdiction could not be asserted over a non-resident who "did not at any time own any interest in any corporation, partnership, or individual distributing its products in Illinois, and did not at any time have the right to exercise any control over the distributors; the relationship between defendant and distributor being that of seller and purchaser" (Pet. App. A33). The majority in *Grobark* did not question its earlier holding in *Nelson* v. *Miller* that Section 17 "reflect[s] a conscious purpose to assert jurisdiction over nonresident defendants to the extent permitted by the due process clause" (*id.* at A26). Rather, expressly relying upon the subsequent decision of this Court in *Hanson*, the court concluded that in the circumstances the defendant had not subjected itself to the jurisdiction of the Illinois courts (*id.* at A32).

The majority opinion in *Grobark* thus rested not on

that court's interpretation of the state long-arm statute, but on the court's view of federal constitutional requirements. There is no basis for petitioners' assertion that the decision of the court of appeals in this case constitutes an improper redrafting of state law as interpreted by the state's highest court. To the contrary, the *Grobark* majority clearly viewed federal constitutional law as determinative, and, as the court of appeals properly held, a federal court is "not bound by a state court's answer to a federal question" (Pet. App. A17). See *Standard Oil Company of California* v. *Johnson*, 316 U.S. 481, 483.

As in *Grobark*, here the court of appeals applied the rule of *Hanson* v. *Denckla*, *supra*, to the facts before it. Thus, it concluded that petitioners had "purposefully availed themselves of the benefits and protection of local law and commerce, and that their contracts have significantly affected the way in which business is conducted in Illinois" (Pet. App. A18).

2. In any event, the facts of this case differ significantly from those in *Grobark*, as the court of appeals noted. On the extensive record here, the court below found that petitioners' control over their Illinois li-

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[7] See *Gray* v. *American Radiator & Standard Sanitary Corp.*, 22 Ill. 2d 432, 176 N.E. 2d 761. Although *Gray* arose under Section 17(1)(b) of the Illinois Civil Practice Act, the so-called "tort" provision, subsequent state court decisions have held that no legal significance attached to the distinction between "transacting business" and "tort" cases for purposes of personal jurisdiction. See, *Ziegler* v. *Hodges*, 80 Ill. App. 2d 210, 215, 224 N.E. 2d 12, 14 (2d Dist.); *Koplin* v. *Thomas, Haab & Botts*, 73 Ill. App. 2d 242, 253-254; 219 N.E. 2d 646, 651-652 (1st Dist.).

censees constituted far more than the transitory relationship of seller and buyer found to exist in *Grobark* (Pet. App. A20-A21):

> The patent license agreement (and the supply agreement which incorporates the restrictions of the license agreement) contains provisions which control aspects of the business activities of the American licensee. Thus, some, if not all, of the principal's economic control over an agent is continuously exercised by [petitioners] over their American representatives. Their continuing relationship, including a significant measure of control over business activities within Illinois, is in our view sufficient to sustain jurisdiction.* * *

3. Petitioners also argue that the court of appeals upheld personal jurisdiction under Illinois law based "on what it considers to be a practical expediency of federal law enforcement" (Pet. at 2, 6). Apparently, petitioners refer to the court's statement that "[i]t is possible that the real issue is whether it is fairer to make appellants come to Chicago to defend their use of an American patent than to allow them a measure of immunity from attack under the Sherman Act" (Pet. App. A19-A20, n. 27). This statement reflects the court's consideration of whether, in the circumstances, maintenance of the government's antitrust suit would offend "traditional notions of fair play and substantial justice," which traditionally have been deemed to be essential elements of due process. *Milliken* v. *Meyer*, 311 U.S. 457, 463; *International Shoe Company* v. *Washington*, *supra*, 326 U.S. at 316.

## CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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